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No. 94-1246

# In the Supreme Court of the United States

OCTOBER TERM, 1994

CLARENCE L. HEDGES, THROUGH PATRICIA HEDGES BECKETT, HIS PERSONAL REPRESENTATIVE, ET AL., PETITIONERS

*v.*

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS, F.A., ETC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

DREW S. DAYS, III
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

ELLEN B. KULKA
*General Counsel*

ANDREW TOMBACK
*Deputy General Counsel*

MARK P. HILEMAN
*Assistant General Counsel*

MUNSELL ST. CLAIR
*Senior Counsel*
*Resolution Trust Corporation*
*Washington, D.C. 20403*

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## QUESTIONS PRESENTED

1. Whether the bankruptcy court's refusal to grant an additional postponement after a two-month continuance because petitioner had not yet retained an attorney constituted a violation of due process requirements.

2. Whether the district court abused its discretion in imposing sanctions and calculating the amount of sanctions.

3. Whether the district court's imposition of sanctions for filing a frivolous legal appeal violated due process.

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**BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 32 F.3d 1360. The opinion of the district court (Pet. App. 17a-23a) and the orders of the bankruptcy court (Pet. App. 27a-30a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 14, 1994. A petition for rehearing was denied on October 11, 1994. Pet. App. 12a. The petition for a writ of certiorari was filed on January 9, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Patricia Hedges Beckett attempted to convey to her father, petitioner Clarence L. Hedges, a life interest in a residential property which she had already used as security for a promissory note held by respondent.[1] Pet. App. 4a. Beckett defaulted on the note and petitioner Hedges filed for bankruptcy. *Ibid.* The bankruptcy court ruled that petitioner Hedges was entitled to a discharge for his pre-petition debts. *Id.* at 31a-32a. Respondent then filed a motion seeking a declaration from the bankruptcy court that 11 U.S.C. 524 did not prevent respondent from attempting to collect, in pending state court proceedings, rents for Hedges' use of the property after his petition for bankruptcy. Pet. App. 4a.

At the initial hearing on respondent's motion, Beckett appeared and sought to represent petitioner Hedges. 3/15/90 Tr. 3.[2] The bankruptcy court denied the request, in part because Beckett was not an attorney and had no legal authority to speak on his behalf. *Id.* at 10; see 28 U.S.C. 1654. Nevertheless, the court postponed the hearing for two months at Beckett's request, in part to permit Beckett to petition the state court to have herself appointed petitioner Hedges' guardian. 3/15/90 Tr. 10-11; Pet.

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[1] Cathedral Mortgage Company, Inc., a wholly owned subsidiary of Gibraltar Savings, F.A., originally held the note. Respondent Resolution Trust Corporation is currently acting as receiver for Gibraltar Savings.

[2] Transcripts of the hearings before the bankruptcy court were part of the record below and have been lodged with the Clerk of the Court.

App. 27a. After the hearing, Beckett was appointed temporary guardian for petitioner Hedges by a state court, *id.* at 4a-5a, and as such could have retained counsel for Hedges, *id.* at 5a-6a. Beckett did not do so. *Ibid.*

At the second hearing before the bankruptcy court, Beckett again appeared without an attorney, seeking another continuance or, in the alternative, to represent petitioner Hedges herself. 5/16/90 Tr. 6, 8. Respondent noted that Beckett had had notice of the proceeding for two months and had failed to obtain an attorney or file a motion for another extension. *Id.* at 7-8. Furthermore, respondent argued that Beckett should not be permitted to act as petitioner Hedges' counsel because she was not an attorney and appeared to have a conflict of interest due to pending state court proceedings. *Id.* at 3-4, 8-9. The court refused to allow Beckett to appear on behalf of petitioner, denied her request for another continuance, and granted respondent's motion on the merits. Pet. App. 29a-30a. Five days after the hearing, petitioner Afton J. Izen appeared as counsel on behalf of petitioner Hedges by filing a motion for reconsideration, which the bankruptcy court denied. Pet. 4; Pet. App. 27a-28a.

2. Petitioner Hedges filed a timely notice of appeal to the district court on May 25, 1990. RTC Dist. Ct. Br. 10. On January 25, 1991, petitioner Hedges died and Beckett was later substituted in as the personal representative of his estate. Pet. App. 19a; Fed. R. Civ. P. 25(a). Respondent filed a motion to dismiss, arguing that petitioner Hedges' death mooted the appeal. Pet. App. 19a-20a. The district court denied the motion, finding petitioner's arguments contesting the bankruptcy court's order were not moot because

it was still possible for respondent to recover from the estate any post-petition rents owed. *Id.* at 20a. In a later decision on the merits, the district court affirmed the bankruptcy court's determination that the bankruptcy proceedings did not prohibit a state court determination of this issue. *Id.* at 21a-22a.

Acting on a request by respondent (RTC Dist. Ct. Br. 26-27), the district court also sanctioned petitioner Izen for fees and costs, finding that the appeal was "frivolous" and that the "legal arguments raised in [petitioner Izen's] briefs are wholly without merit" and "were often difficult to understand and poorly drafted, requiring extra effort on the part of [respondent]." Pet. App. 22a, 16a.[3] The court awarded respondent attorney's fees and costs as a sanction. *Id.* at 22a. Relying on respondent's verified statements and time sheets, it calculated the sanction at approximately $24,000. *Id.* at 15a-16a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court rejected the argument that the bankruptcy court violated petitioner Hedges' constitutional right to counsel by denying a second postponement because there is no absolute right to counsel in civil proceedings and because Beckett, as his guardian, could have retained counsel for him. *Id.* at 6a. The

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[3] The court also found that "the record is replete with [petitioner Izen's] requesting numerous extensions and [her] failure to follow the proper procedural rules unless ordered by this Court." Pet. App. 22a-23a. Specifically, petitioner Izen sought three extensions; made two "botched attempts at posting the bond [necessary for a stay pending appeal] * * * before finally getting it right"; filed an opening brief devoid of any reference to the record, resulting in the need to file a second brief; and filed a series of frivolous motions. *Id.* at 5a, 25a-26a.

court also rejected petitioner Izen's challenges to the court-ordered sanctions, holding that Bankruptcy Rule 9011 permitted a district court to award sanctions, and that the district court did not abuse its discretion in sanctioning petitioner Izen or in calculating the amount of sanctions. Pet. App. 8a-9a.

**ARGUMENT**

1. Petitioner Hedges claims (Pet. 6-7) that the bankruptcy court's failure to grant more time to obtain counsel violated due process. A party's right to be represented by his or her own counsel in civil proceedings is protected by the Due Process Clause. See *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970); *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); *Texas Catastrophe Prop. Ins. Ass'n* v. *Morales*, 975 F.2d 1178, 1180-1181 (5th Cir. 1992), cert. denied, 113 S. Ct. 1815 (1993). "A necessary corollary is that a [party] must be given a reasonable opportunity to employ and consult with counsel." *Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954); see *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986) (collecting cases).

Although in extreme circumstances the failure of a court to grant a party additional time to obtain counsel can violate due process standards, see, *e.g.*, *Chandler*, 348 U.S. at 10; *Anderson* v. *Sheppard*, 856 F.2d 741, 748-749 (6th Cir. 1988); *Rios-Berrios* v. *INS*, 776 F.2d 859, 862-863 (9th Cir. 1985); *Castaneda-Delgado* v. *INS*, 525 F.2d 1295, 1298 (7th Cir. 1975), this Court has cautioned that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983); see *Ungar*

v. *Sarafite*, 376 U.S. 575, 589 (1964) ("it is not every denial of a request for more time that violates due process even if the party * * * is compelled to defend without counsel").

Several factors indicate that the bankruptcy court's decision not to grant a second extension in this case was not a violation of due process. First, it was petitioner Hedges who was the catalyst of the current litigation when he invoked the authority of the bankruptcy court by filing a pro se petition in August, 1989. Pet. 4; Pet. App. 31a. He should not be heard to complain that in May, 1990, he was unprepared for the prospect of litigation. Second, when respondent sought a declaration of its rights, the hearing date was postponed for two months in order to provide an opportunity for petitioner Hedges to be represented. Pet. App. 27a. During the two-month respite, Beckett was appointed petitioner Hedges' temporary guardian by a state court and could have retained counsel for him, but had not done so by the time of the hearing. *Id.* at 6a, 20a-21a.[4]

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[4] Although petitioner claims (Pet. 4) that Beckett could not retain counsel until she was appointed permanent guardian by the state court, this assertion is contradicted by the record. While Beckett did not become petitioner Hedges' permanent guardian until May 24, 1990 (Pet. 4), petitioner Izen, an attorney retained by Beckett (Pet. App. 29a), appeared as petitioner Hedges' attorney on the motion for reconsideration filed May 21, 1990 (Pet. 4). Indeed, at the May 16, 1990, hearing Beckett informed the court that she had "been assured by [a state court judge] that [she] could go ahead and appoint an attorney to represent [her] father in this matter" while only his temporary guardian. 5/16/90 Tr. 6. Moreover, to the extent that petitioner's challenge relies on a claim that the district court and court of appeals misinterpreted Arizona law, "[n]ormally, * * * [the Court] defer[s] to the construction of

Continuances of this length are usually constitutionally sufficient. See, *e.g.*, *Ghajar* v. *INS*, 652 F.2d 1347, 1348-1349 (9th Cir. 1981) (one-month continuance adequate); *United States* v. *9.19 Acres of Land*, 416 F.2d 1244, 1245 (6th Cir. 1969) (court should have granted continuance when defendant only had one week to obtain counsel; 14 to 30 days is considered adequate). Finally, five days after the second hearing, petitioner Hedges had not only obtained counsel, but counsel had become familiar enough with the case to file a motion for reconsideration, suggesting that petitioner Hedges' request for further delay may have been due to his own lack of diligence. Under these circumstances, the bankruptcy court's decision not to grant another continuance and to proceed to act on the merits was not an abuse of discretion and did not violate due process. As the bankruptcy court noted, "[petitioner Hedges] has had ample time to respond * * * and has had his day in Court." Pet. App. 27a.

2. Petitioner Izen argues (Pet. 8-10, 12) that the district court erred in imposing sanctions and in calculating the amount of sanctions. Federal Bankruptcy Rule 9011 provides that a court before which a bankruptcy case is proceeding shall impose an "appropriate sanction" on any person who signs and files a paper which "reasonable inquiry" would show is not "warranted by existing law or a good faith argument for the extension, modification, or reversal

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a state statute given it by the lower federal courts" and will decline to follow their view only if "there is 'plain' error." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499, 500 n.9 (1985).

of existing law."[5] Rule 9011, like the analogous Fed. R. Civ. P. 11, does not require a finding of bad faith; instead, a court must examine the document in question objectively, determining whether the filing was reasonable under the circumstances. See *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 498 U.S. 533, 551 (1991) (Rule 11); *In re D.C. Sullivan Co.*, 843 F.2d 596, 598-599 (1st Cir. 1988) (collecting Rule 9011 cases).

The district court in this case found that petitioner Izen had filed a "frivolous" appeal because "[t]he legal arguments * * * [were] wholly without merit." Pet. App. 22a. Such a determination is reviewed for an abuse of discretion. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (Rule 11); *In re Marino*, 37 F.3d 1354, 1358 (9th Cir. 1994) (Rule 9011); *In re Coones Ranch, Inc.*, 7 F.3d 740, 743 (8th Cir. 1993) (Rule 9011). Petitioner Izen suggests (Pet. 8-10) that an abuse of discretion occurred in this case because the district court had earlier denied respondent's motion to dismiss the appeal and described the appeal as involving "viable" issues. Pet. App. 25a. In context, however, it is clear that the district court's ruling denying dismissal was not a measure of the merits of petitioners' arguments.

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[5] While the district court relied upon Fed. R. App. P. 38 in imposing sanctions, the court of appeals found that, even though the district court was acting in an appellate capacity, it was not a "court of appeals" for purposes of Rule 38. Pet. App. 8a. However, the court of appeals held that the district court had equivalent sanctioning authority under Bankruptcy Rule 9011. *Ibid.*; accord *In re Roete*, 936 F.2d 963, 967 (7th Cir. 1991). The district court's error was harmless because filing frivolous appeals is prohibited under both provisions. Cf. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 407 (1990).

Instead, the order merely indicated that the death of petitioner Hedges did not in and of itself make the appeal moot. Petitioner also makes general claims (Pet. 9-10, 12) that her appeal was not frivolous and that the sanction imposed was excessive. The district court, however, is in the optimal position to make such a determination, the court of appeals did not find that the district court had abused its discretion, and petitioner's fact-specific claims to the contrary do not warrant further review by this Court. See *Cooter & Gell*, 496 U.S. at 402-403.

3. Petitioner Izen also argues (Pet. 10-11, 13) that the district court's imposition of sanctions against her was unconstitutional. Contrary to petitioner Izen's claim (Pet. 10), neither the "American Rule" nor due process requires a finding of bad faith or recklessness before a sanction authorized by a statute or court rule may be imposed. See *Chambers* v. *NASCO*, 501 U.S. 32, 46-47 (1991); *Business Guides*, 498 U.S. at 553.

Similarly, petitioner Izen's claim (Pet. 10) that the district court's imposition of sanctions without an evidentiary hearing violated due process ignores the distinction between sanctions based on objectively unreasonable arguments and those based on bad faith.[6] When the basis for a sanction is a determination that the person acted with a culpable mental state, an evidentiary hearing is normally required in order to

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[6] Petitioner Izen seems to suggest (Pet. 12) that the district court sanctioned her for her motions practice and her failure to comply with court rules. While the court did refer to these events (Pet. App. 22a-23a), it explained that no hearing was necessary because the sanction was based on petitioner's "objectively groundless legal arguments in [the] briefs filed." *Id.* at 23a.

permit crucial credibility determinations. Cf. *Califano* v. *Yamasaki*, 442 U.S. 682, 696-697 (1979); *Goldberg*, 397 U.S. at 269. However, when the conduct to be sanctioned consists of making groundless legal arguments, the documents essentially speak for themselves and an evidentiary hearing is not necessary. Cf. *Yamasaki*, 442 U.S. at 696; *Mathews* v. *Eldridge*, 424 U.S. 319, 343-345 (1976); see, *e.g.*, *Childs* v. *State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1026 (5th Cir. 1994); *A. Hirsh, Inc.* v. *United States*, 948 F.2d 1240, 1250 (Fed. Cir. 1991); *Dodd Ins. Servs., Inc.* v. *Royal Ins. Co. of Am.*, 935 F.2d 1152, 1160 (10th Cir. 1991). In this case, all that due process required was notice and an opportunity to have one's arguments considered, *Goldberg*, 397 U.S. at 267-268, and petitioner Izen does not allege that she did not have adequate notice or a sufficient opportunity to submit a written defense, nor does she describe any relevant evidence she would have presented that might have changed the outcome. Under these circumstances, an evidentiary hearing would have contributed nothing but further delay.

Finally, petitioner Izen makes conclusory claims that imposing sanctions against her violated the First (Pet. 13), Fifth (Pet. 13), Eighth (Pet. 11-12, 13), and Fourteenth (Pet. 10, 13) Amendments. While some of these claims were raised in petitioners' petition for panel rehearing, none of them were raised prior to that, and they thus are not properly before this Court. See *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

ELLEN B. KULKA
*General Counsel*

ANDREW TOMBACK
*Deputy General Counsel*

MARK P. HILEMAN
*Assistant General Counsel*

MUNSELL ST. CLAIR
*Senior Counsel*
*Resolution Trust Corporation*

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